IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1228 of 1993

WITH

CRIMINAL APPEAL No 1251 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKORE BHALAJI PRATAPJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1228 of 1993
   MR UA TRIVEDI for Petitioner No. 1
   MR KC SHAH, APP for Respondent No. 1
2. Criminal Appeal No. 1251 of 1993
   MR AD SHAH for Petitioner No. 1
   MR KC SHAH, APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 21/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. Both these appeals have been filed by original accused nos. 2 and 1 respectively of Sessions Case No. 123/1993. They have preferred these appeals u/S. 374 (2) of the Code of Criminal Procedure (for short 'Cr.P.C.') challenging their conviction u/S. 302 read with section 34 of the Indian Penal Code [for short 'IPC'] and u/S. 323 of the IPC recorded by the Ld. Addl. Sessions Judge, Mehsana on 21st September, 1993 whereby the appellants have been sentenced to undergo imprisonment for life and to pay fine of Rs.2,000/- each, in default RI for six months for offence made punishable u/S. 302 read with section 34 of the IPC and RI for one month for offence made punishable u/S. 323 of the IPC.

2. Case of the prosecution, briefly stated, is as under :-

2.1. The incident had taken place at village Meo, district Mehsana on 5th January, 1993. On that day the present appellants, who hereinafter will be referred to by their original position in the Sessions case, alongwith two other accused, namely, Thakor Sagramaji Kaluji and Thakor Vanaji Pratapji came to the place where complainant Natvarji Shivaji Thakor stayed with his family. His family comprised his wife and father. It was around 1.00 p.m. All the accused came there with the intention to negotiate with complainant Natvarji Thakor, who on earlier occasion had filed criminal complaint against the relatives of the present accused. They had come to ask Natvarji to withdraw the earlier complaint. When they reached the house of the complainant, his father Shivaji Karnaji was resting on a cot and as he heard the accused speaking filthy abuses, he asked them why they were uttering such filthy abuses. At that time accused no. 1 told him that he should ask his son to withdraw the complaint and he should settle the matter with them. However, Shivaji refused to settle the matter with the accused. This attitude of Shivaji annoyed the accused to such an extent that accused no. 1 gave two blows with stick on the head and near the right eye of Shivaji. On seeing assault on the father, the complainant and his wife also intervened with a view to

rescue him. At that time accused no. 2 gave a blow with stick on the wrist of the left hand of wife of the complainant, whereas accused no. 3 Sagramji Kaluji caused injury to the complainant on his left wrist. On receiving the stick blows Shivaji fell down on the ground. The complainant and his wife raised shouts calling for help and on hearing them Mangalgiri Somgiri as well as Dilipji Chandanji working in the fields nearby came there and saved the complainant and others from further beating. The accused thereafter went away. Since Shivaji was seriously injured, he was taken to the village on cot and the complainant arranged to procure a jeep car to take his father to the hospital. Alongwith the complainant, his wife and uncles Abaji Karnaji and Tarlaji Karnaji started for the hospital. The complainant got down at Langhnaj Police Station and the rest of the persons proceeded to Mehsana Government Hospital for admitting the injured for treatment. At the police station Ranjitsinh Khodaji Rathod, the P.S.I. was on duty. Natvarji gave the complaint, on the strength of which offence u/S. 325 of the IPC came to be registered against the accused.

2.2. At the hospital at Mehsana Shivaji was given treatment by Dr. Bhagwandas D. Modi, Medical Officer in Mehsana General Hospital. After initial treatment and on finding the condition of the patient serious, the doctor advised the patient to be removed to Civil Hospital at Ahmedabad and accordingly on the same evening he was brought to Ahmedabad for further treatment. On 6th January, 1993 Shivaji succumbed to his injuries at about 9.00 a.m. Necessary information was conveyed to the concerned police station and, therefore, the offence was converted u/S. 302 in place of u/S. 325 of the IPC.

2.3. The investigation was handled by Ranjitsinh Khodaji Rathod, P.S.I. and in the course of the same, he arrested the accused, got various panchnamas drawn, seized the sticks used for committing crime at the instance of the accused, recorded statements of various persons conversant with the facts of the case and also got the post mortem done of the dead body of Shiaji Karnaji and on completion of the investigation, he submitted chargesheet in the Court of the Ld. Judicial Magistrate First Class at Mehsana, who in turn committed the case to the Court of Sessions as offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial, the Ld. Addl. Sessions Judge, Mehsana framed charge against all the accused on 20th July, 1993, which is at Exh. 11. Vide said charge the

accused were charged with committing offence u/S. 302 read with section 34 of the IPC and for committing offence u/S. 323 of the IPC. The accused denied the charge and claimed to be tried.

3.1. In the course of the trial, the prosecution examined 11 witnesses and also placed reliance on certain documentary evidence such as complaint, inquest panchnama, panchnama of discovery of weapons, post mortem report, etc. After recording of the evidence was over, the accused u/S. 313 of the Cr.P.C. were put all the circumstances appearing against them in the evidence with a view to enable them to render any explanation, if they so desired. It appears that their defence was that of general denial. However, accused nos. 1, 2 and 4 gave a written reply on 9th September, 1993 stating therein that they were innocent. They had not gone to the house of the complainant. It is also stated that none of them had caused any injury either to the deceased - Shivaji or to the complainant or to witness Laliben. They have further stated that one Badalji Shakaji with whom the accused had some dispute with regard to land, had accompanied the complainant to the police station and at his instance the false complaint is recorded against them. They have further stated that the complainant was indulging into selling illicit liquor and since we asked them not to deal in liquor business, he was bearing enmity against them. According to them, they have been deliberately involved in this case.

3.2. At the end of the trial, the Ld. trial Judge came to the conclusion that the prosecution was able to establish its case beyond any reasonable doubt against accused nos. 1 and 2 for committing offence u/S. 302 read with section 34 of the IPC. He further came to the conclusion that against the accused no. 2 offence u/S. 323 was established. He, therefore, convicted them for aforesaid offences and passed sentence which is already referred to above. Accused nos. 3 and 4, however, came to be acquitted by the Ld. Judge.

4. Mr. A.D. Shah, Ld. counsel for accused no.1 and appellant of Criminal Appeal No. 1251 of 1993 has submitted before us that the Ld. trial Court has committed error in convicting accused no. 2 and incidentally also accused no. 1 for committing offence u/S. 302 of the IPC. He has further submitted that considering the oral evidence on record, it appears that the case of the prosecution that out of two injuries on head of the deceased, one was caused by accused no. 1, whereas the other was caused by accused no.2. He has

further submitted that considering the medical evidence on record, two injuries are found on the head and considering the oral evidence led by the prosecution, it appears that there are two versions, namely, according to the complainant, accused no. 1 had given two blows on the head of the deceased with stick and the second version that one blow was given by accused no. 1 and the other by accused no. 2. In light of such discrepancy in evidence it was not sure who caused which blow on the head of the deceased. He has further submitted that since the intention on the part of the accused was not to cause death, but only to cause injuries to the complainant and his relatives, the provisions of section 34 could not be attracted to convict the appellants for offence u/S. 302 of the IPC. According to him, at best the accused could be convicted either for offence u/S. 325 or 326 or 304 Part-II of the IPC. He has lastly submitted that since both the accused have undergone imprisonment for more than 9 years, the Court may impose sentence of imprisonment already undergone and direct that the accused be set at liberty forthwith.

4.1. Mr. U.M. Triedi, Ld. counsel appearing for original accused no. 2 and appellant of Criminal Appeal No. 1228 of 1993 has submitted that except for prosecution witness Laliben's evidence, there is nothing on record to show that accused no. 2 had delivered a blow with stick on the head of the deceased. He has further submitted that part of the evidence of Laliben wherein she involves accused no. 2 for attacking the deceased cannot be believed because it runs counter to the prosecution case and according to the prosecution case, it is accused no. 1 who has delivered blows with stick on the head of the deceased. He, therefore, submits that accused no. 2 deserves acquittal.

4.2. Mr. K.C. Shah, Ld. APP appearing for the respondent - State in both the appeals, has submitted that no error has been committed by the trial Court in convicting the accused for offences u/S. 302 read with section 34 of the IPC and accused no. 2 for offence u/S. 323 of the IPC. He has submitted that looking to the facts of the case and in particular that all the except one accused had come duly armed with sticks and they had thereafter assaulted deceased by causing injuries on his vital part, it is very clear that they had common intention to cause death of the deceased and that intention was shared by atleast these two accused and the death was caused in pursuance of their common intention. He has, therefore, submitted that the appeals have no merits and they deserve to be dismissed.

4.3. All the counsels have taken us through the entire record of the case and they have placed reliance and in particular the material which supports their submissions. We have also carefully scrutinised the evidence on record with a view to reappreciate the same.

5. The prosecution, with a view to establish that the deceased had died homicidal death, has examined two witnesses, namely, Dr. Bhagwandas Dahyalal Modi P.W. 4 Exh. 32 and Dr. Vinayakrao Vasudevrao Patil P.W. 4 Exh. 37 and it has also placed reliance on the documentary evidence such as post mortem report at Exh. 38 and the X-ray report at Exh. 36.

5.1. Dr. Bhagwandas Modi has stated that at the relevant time he was working as Medical Officer in Mehsana General Hospital. On 5th July, 1993 at about 4.10 p.m. Shivaji Karnaji Thakor was brought to the hospital with police Yadi for medical treatment. He was informed that the patient had received injuries with stick. On examination he found one injury being abrasion DTS on forehead left side, size 4 cm. x 2 cm. On X-ray being taken, fracture in left frontal bone, and second injury being small assul on base of right leg big toe. In his opinion, these injuries were caused by hard and blunt substance. He has stated that when he examined the patient, he was unconscious and considering the serious condition of the patient he advised him to be removed to Ahmedabad Civil Hospital and accordingly at 7.00 p.m. the patient was removed to Ahmedabad. The witness has issued medical certificate at Exh. 33 indicating the injuries noticed by him during treatment.

5.2. Dr. Vinayakrao V. Patil, P.W.5 Exh. 37 at the relevant time was working as Tutor in Forensic Medicine Department attached to B.J. Medical college, Ahmedabad. According to him, B.J. Medical College is affiliated to Ahmedabad Civil Hospital. On 6th January, 1993 he received from Shahibaug Police Station dead body of Shivaji Karnaji at about 2.25 p.m. alongwith inquest report and post mortem form. He commenced the autopsy at 2.35 p.m. and completed the same at 4.30 p.m. He has indicated the external injuries noticed by him during examination of the dead body in column no. 17 of the post mortem report. They are as under :-

(1) Contused abrasion is present at Rt. eyebrow size 3 x 2 cm.
(2) contused abrasion is present on left fronts parietal region of head, size 3 x 3 cm.

(3) contused abrasion is present on left temaro parietal region of head, size 3 x 3 cm.
(4) contused of lacerated wound is present on base of Rt. great toe of Rt. foot, size 2 x 1 cm, muscle deep.

He also found internal injuries in column no. 19 of the post mortem report :-

(1) Brasing of scalp is seen on entire head region.
(2) Thick haematomas of 1.5 cm thickness is seen below scalp of above skallin entire frontal of parietal region.
(3) There is a depressal fracture of skull on left side in left parietal bone of size 4 x 3 cm. The angles of depressal fracture are radiating forwards of trazzils Rt. and backwards of trazzils dept as shown in diagian.
(4) Thick extraclevical haematomas is seen below depressal fracture of size 9 x 7 x 1.5 cm.
(5) Thick sebdural haemorrhage is seen on active brain.
(6) There is lacerationing brain tissue at back of left frontal of temperedpaid as 2 cm depth, the lacerated brain tissue as become necrosed (dead) of is seen mixed with clots of blood.
(7) The entire brain is congested and edematous.

He has stated that on account of head injury and the resultant bleeding, eyes of the dead body had got blacken. According to him, all the internal injuries were corresponding to external injuries nos. 2 and 3. These injuries were antemortem and injuries nos. 2 and 3 were sufficient in ordinary course of nature to cause death. In his opinion, the cause of death was due to shock as a result of head injury. In the cross examination of this witness, nothing of any importance has been brought out by the defence and his evidence has virtually gone unchallenged. He has produced the post mortem report on record at Exh. 38. Over and above this, the prosecution has also placed reliance on inquest panchnama with a view to show the external injuries suffered by the deceased. It is at Exh. 42 on record.

5.3. Considering the aforesaid medical evidence, it is very clear that the deceased had died as a result of the injuries suffered by him and in particular injuries nos. 2 and 3 as shown in column no. 17 of the post mortem report. We have, therefore, no hesitation in holding that the deceased had died homicidal death. The Ld. trial Court has, therefore, not committed any error in

arriving at this finding.

6. With a view to establish that it was the accused, who in a conjoint effort, assaulted the deceased and caused his death, the prosecution has mainly relied on the evidence of the eye witnesses and the complaint made before the Langhnaj Police Station.

6.1. Natvarji Shivaji Thakor P.W.1 Exh. 26 is an eye witness as well as complainant of this case. He is the son of deceased. He has stated in his evidence that on the day of incident he was staying by erecting a house on a Kharaba land situated at the distance of about half kilometer from the village Meo. According to him, on the day of incident at about 1.00 p.m. the accused who also stayed nearby, came there armed with sticks and they started giving filthy abuses. He has stated that at that time accused no. 2, accused no. 1 and accused no. 3 were having sticks with them; whereas accused no. 4 did not carry any arm with him. He has further stated that when his father asked the accused as to why they were uttering abuses, accused no. 1 asked questioning that why his son was not withdrawing the complaint which was filed against the father of accused no. 1 and why he (son of the deceased) i.e. the witness was not settling the matter. Thereupon, father of the witness told him that he would not allow any settlement to happen. This enraged the accused and accused no. 1 gave stick blow on the head of the father of the witness. He again gave a second blow near the eye of his father. This witness has further stated that with a view to save his father, he and his wife intervened. At that time accused no. 2 gave one blow with stick on the left hand wrist of his wife and accused no. 3 gave one blow on the left hand wrist of the witness. He has further stated that on receiving the injuries, his father fell down on the ground and they raised shouts for help, hearing which persons working in nearby field, namely Mangalgiri Somgiri and Dilipji came there and saved them from further beating. Accused thereafter left the place and went home. According to the witness, his father was thereafter brought to the village in the cot and after he managed to get a jeep car to remove his father to the hospital, he alongwith his two uncles and wife started for the hospital at Mehsana. On way near Langhnaj he got down and went to the Police Station for lodging complaint. His complaint was recorded by the police, which is produced at Exh. 27. He has further stated that after his father was admitted in the hospital, he came back home and again went to Mehsana Hospital at about 8.30 p.m. but there he was told that his father

was already shifted to Civil Hospital at Ahmedabad and, therefore, he returned home. Next day i.e. on 6th January, 1993 he went to Ahmedabad at about 10.00 a.m., but he was informed by his uncle that his father had already expired at about 9.00 a.m. The witness identified the accused in the Court. In the cross-examination by the defence for accused nos. 1, 2 and 4, effort has been made, by putting questions on the topography of the area and the situation of the respective houses, to show that the witness could not have seen the incident and also to show that the prosecution has not examined independent witnesses though they were available. Attempt has also been made to show that the accused were being falsely involved by the complainant because of the enmity and the complaint was as per the say of one Badalji Sankaji who was also on enemical terms with the accused and their relatives. In the cross-examination this witness has again stated that his father had received two stick blows and after his assault was over, he and his wife were injured. It has been suggested to this witness that he did not carry on well with his father on account of his father extending financial help to one Manaji and that was not liked by the complainant. It has also been suggested that on the day of incident, the complaint had a physical fight with his own father and as his father dashed with the wooden pole, head injuries were caused to him. All these suggestions have been flatly denied by the witness. This witness has also been cross-examined by counsel for accused no. 3. But in the entire cross-examination no material has been brought out which would discredit the evidence of this witness.

6.2. Exh. 27 is the complaint given by Natvarji and perusal of the same shows that it is in consonance with the oral evidence of Natvarji and there is hardly any discrepancy between the two.

6.3. The second witness examined by the prosecution is Laliben Natvarji P.W. 2 Exh. 28, wife of complainant Natvarji Shivaji. She has stated that on the day of incident she was preparing food and at that time she heard voices of accused nos. 2 and 3. She, therefore, came out of the house and saw that accused nos. 1, 2 and 3 armed with sticks, whereas accused no. 4 did not carry any arm. The accused pressurized her father-in-law that why they were not arriving at compromise in complaint which was filed against the relatives of the accused. However, her father-in-law denied to do so. Thereupon the accused got excited and according to this witness, it was accused no. 2 who gave one blow with stick on the

head of her father-in-law. Immediately she and her husband intervened to save her father-in-law and at that time accused no. 3 caused injury on her left hand wrist with stick. She immediately changed her version and again stated that it was accused no. 2 who had caused injury to her, whereas accused no. 3 had caused injury to her husband on right wrist with stick. She has further stated that accused no. 1 had delivered only one blow to her father-in-law with stick. On receiving this blow, her father-in-law fell down on the ground and became unconscious. She has further stated that on hearing shouts only Mangalgiri came there and none else. When Mangalgiri asked accused why they were fighting all the accused went home. According to her, Natvarji went to the village and brought a jeep car by which the injured was taken to Mehsana Hospital. According to her, her two uncles in law and her husband went in the jeep. Her husband got down at Langhnaj Police Station and the others proceeded to Mehsana Civil Hospital. At the Mehsana Civil Hospital her father-in-law was admitted for treatment. According to her, she also received treatment at that hospital. Subsequently her father-in-law was removed to Civil Hospital at Ahmedabad where on the next day he expired. This witness also identified the accused in the Court room. In the cross-examination by the defence counsel for accused nos. 1, 2 and 4 more or less same questions have been put to her as they were put to the complainant. She has denied the suggestion that she came out of the house when her father-in-law had already fallen down on the ground. She has, however, stated that her father-in-law fell down on the ground only after accused no. 2 gave him stick blow. She has further stated that accused no. 2 had given stick blow on the head of her father-in-law. To this witness also suggestion has been made by the defence that the relations between the father and son was not very good and on account of some financial dispute, on the day of incident, they had physical fight and in that fight her father-in-law had received these injuries. This has been denied by the witness. Nothing much has been brought out in the cross-examination by the defence.

6.4. Prosecution has also examined Mangalgiri Somgiri Goswami P.W.3 Exh. 29. This witness has not supported the prosecution and he has been declared hostile. In the examination-in-chief he has been confronted with his statement given to the police during the course of the investigation. In the cross-examination by the Ld. APP he has denied that he had ever stated to the police in his statement that on hearing the commotion he immediately went there and found that accused no. 2 and

accused nos. 3 and 4 and also accused no. 1 were quarreling with the deceased and his son. He has not been cross-examined by the defence. However, considering the fact that he has not supported the prosecution and in the process he has been declared hostile and hence we do not propose to place any reliance on his evidence.

6.5. Dilipji Chandanji P.W. 6 Exh. 39 has also been examined by the prosecution as an eye witness to the incident. However, he like Mangalgiri, has not supported prosecution and he has been declared hostile. Therefore, evidence of both these witnesses is not helpful to take the prosecution story any further.

6.6. The next important witness is Ranjitsinh Khodaji Rathod P.W. 11 Exh. 48, the Investigating Officer in this crime. According to this witness, on 5th January, 1993 he was attached to Langhnaj Police Station as P.S.I. On that evening he had received a complaint that Shivaji Karnaji being injured by means of stick. The evidence of this witness shows that the weapons used for commission of crime were seized from the custody of the accused.

7. Considering the aforesaid oral evidence, it emerges that previously the present complainant Natvarji had filed criminal complaint against Amraji Dhulaji, Dayaji Amraji, Govindji Laxmanji and Laxmanji Pratapji on 19th May, 1992 for committing offence made punishable under Sections 325, 323, 504 and 114 of the IPC. Though copy of the said complaint is not exhibited and it is only marked 19/6, there is other evidence available to prove this fact. It is this complaint which was sought to be settled by the accused. It also appears that this process was going on for last some time prior to the incident. On the day of incident, it appears, that the accused came there with a view to see that complainant any how agreed to settling the matter and, therefore, they also decided to use some force. It was during this time, there appears to be some hot exchange of words between the father of the complainant and the complainant on one side and the accused on the other and when the complainant or his father did not agree to withdraw the complaint, they attacked the deceased with sticks since it was he who had mainly resisted the compromise. In the process of assault two blows came to be given on the head of deceased. However, there are two versions on the record given by the prosecution witnesses. According to one version, it was the accused no. 1 who had given both the blows on the head; whereas according to other version, it was accused no. 2 and 1 who had delivered one blow each with stick on the head of the deceased.

There is no material on record to decide which of the version is correct. We are, therefore, inclined to hold that both the accused nos. 1 and 2 had given one blow each on the head of the deceased. The medical evidence on record in the form of evidence of Dr. Patil shows that injuries nos. 2 and 3 together were sufficient in ordinary course of nature to cause death. Meaning thereby these injuries individually were not capable of causing death of the deceased. From the evidence of the eye witnesses it also appears that the accused had come only with the intention to use some criminal force in the event the complainant and his father did not agree to settle the matter and since the complaint and his father remained adamant, they caused injuries to them. Therefore, at best it can be said that there was common intention which was shared by all the accused and in particular accused nos. 1 and 2 to cause physical harm to either of the persons, namely the deceased or his son - the complainant. Of-course looking to the nature of the sticks used for assault and the vital part of the body, namely head, chosen for causing injury, it can be said that the accused could have had the knowledge that their assault may result into the death of the victim. But in view of the fact that they did not entertain any intention to cause death, the offence may not fall u/S. 302 of the IPC. In our opinion both the accused can at the most be saddled with the liability of the offence made punishable u/S. 304 Part-II of the IPC. We are, therefore, of the opinion that the conclusion arrived at by the Ld. trial Judge to the effect that both the accused are guilty of committing offence u/S. 302 read with section 34 of the IPC is erroneous and it is required to be set aside. Hence, we set aside the conviction of the accused nos. 1 and 2 i.e. appellants of the present appeals from one u/S. 302 read with section 34 of the IPC to one u/S. 304 Part-II read with section 34 of the IPC. At the hearing the learned counsels have submitted that both the accused have undergone actual imprisonment of more than nine years. We are, therefore, of the opinion that the same is sufficient for the purpose of meeting the ends of justice and hence we impose the sentence of imprisonment already undergone for committing aforesaid offence.

8. In the result, both the appeals are partly allowed. The conviction of the appellants is converted from one u/S. 302 read with section 34 of the IPC to u/S. 304 Part-II read with section 34 of the IPC and they are sentenced to suffer imprisonment already undergone is imposed. Since they are sentenced to suffer

imprisonment already undergone, the Prison Authorities are directed to set them at liberty forthwith, if not required for any other purpose.

Muddamal articles to be disposed of in terms of the direction given by the Ld. trial Judge in the impugned judgment.

[K.R. VAYS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.